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Case No. SC84082

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Arthur G. Muegler, Jr. #17940
P.O. Box 230143
St. Louis, Missouri 63123
(314)324-7739
Attorney for Relator Kinder

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I.
TABLE OF CONTENTS

	<u>Page</u>
Table of Cases And Authorities	1
Statement of Jurisdiction	3
Statement of Facts	3
Point Relied On	3
Argument	5
Reply Point I	5
Reply Point II	21
Conclusions	23
Rule 84.06(c) Certification	24
Certificate of Service	25

ABBREVIATIONS USED

Petition For "Stop Order",		
Preliminary Writ of Prohibition And	Petition
Permanent Writ Of Prohibition, Case		
SC84082		
Answer	Answer

I(A).
Table Of Cases, Statutes And Authorities

(A) Cases	Pages
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---	—
<u>Bose Corp. v. Consumers Union of United States</u> , 466 U.S. 485 (1984)	6
<u>Ciarelli v. State</u> , 441 S.W.2d 695 (Mo. 1969)	23
<u>Cuyler v. Sullivan</u> , 446 U.S. 335 (1980)	6
<u>Henderson v. Smith</u> , 903 F.2d 534 (8th Cir. 1990)	22,23
<u>Murphy v. Carron</u> , 536 S.W.2d 30 (Mo. banc 1976)	6,20
<u>State ex rel Fleer v. Conley</u> , 809 S.W.2d 405 (Mo. App. 1991)	23
<u>Sumner v. Mata</u> , 455 U.S. 591 (1982)	6
<u>Wheat v. United States</u> , 486 U.S. 153 (1988)	7,8,11,12,14,18

(B) Statutes and Other Authorities :

<u>U.S.Const. Sixth Amendment</u>	11,14
<u>Mo. Const. art. V, §4</u>	7
Mo. Supreme Court Rule 4, <u>Rules of Professional Conduct</u> , Rule 1.7	6,17,18,19,23
Mo. Supreme Court Rule 4, <u>Rules of Professional Conduct</u> , Rule 3.3(a)(4)	17
Mo. Supreme Court Rule 4, <u>Rules of Professional Conduct</u> , Rule 3.4(b)	17

II.

Statement of Jurisdiction

Relator Adrian Kinder ("Adrian") hereby incorporates by reference his Statement of Jurisdiction contained in Relator's Brief (2/11/2002).

III.

Statement of Facts

Adrian hereby incorporates by reference his Statement of Facts contained in Relator's Brief (2/11/2002).

IV.

Point Relied On

Reply Point I.

Relator is entitled to an absolute writ of prohibition as contended in Brief of Relator Point I because (a) the trial court's disqualification order is not reviewed on a deferential "abuse of discretion" standard as contended in Respondent's Brief, but, rather, is reviewed *de novo* and (b) Respondent Judge's order is not supported by substantial evidence in that The State failed to present sufficient Wheat evidence at hearing showing the Sixth Amendment presumption in favor of Muegler's

continued representation of Adrian Kinder as Adrian Kinder's attorney of choice was overcome by hearing evidence showing Muegler's representation of Adrian Kinder presented a serious potential conflict of interest which involved a substantial risk that Relator would not receive a fair trial if Muegler's representation continued.

The three most apposite cases are :

Cuyler v. Sullivan, 446 U.S. 335 (1980);

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976)

Wheat v. United States, 486 U.S. 153 (1988)

Other cited authority :

U.S.Const. Sixth Amendment

Mo. Const. art. V, §4

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 3.3(a)(4)

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 3.4(b)

Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 3.4(e)

Reply Point II.

In the alternative to relief under Relator's Brief Point I, if The Court finds Muegler had a disqualifying conflict of interest, Relator Adrian Kinder ("Adrian") is entitled to (1) an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The

County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") and (2) a supplementary order directing the trial court to conduct a hearing to determine whether Adrian knowingly and voluntarily waives the "ineffective assistance of counsel" issues presented in this case because (1) no disqualifying constitutionally or ethics based conflict of interest is implicated if Adrian knowingly and voluntarily waives an attorney conflict of interest and (2) at the prior hearing Adrian did not believe Muegler had a conflict of interest, and, therefore, it was not possible for Adrian at that time to "knowingly and voluntarily waive" any conflict of interest.

The three most apposite cases are :

Ciarelli v. State, 441 S.W.2d 695 (Mo. 1969)

Henderson v. Smith, 903 F.2d 534 (8th Cir. 1990)

State ex rel Fleer v. Conley, 809 S.W.2d 405 (Mo. App. 1991)

V.

Argument

Reply Point I.

Relator is entitled to an absolute writ of prohibition as contended in Brief of Relator Point I because (a) the trial court's disqualification order is not reviewed on a deferential "abuse of discretion" standard as contended in Respondent's Brief, but, rather, is reviewed *de novo* and (b) Respondent Judge's order is not supported by substantial evidence in that The State failed to present sufficient Wheat evidence at hearing showing the Sixth Amendment presumption in favor of Muegler's

continued representation of Adrian Kinder as Adrian Kinder's attorney of choice was overcome by hearing evidence showing Muegler's representation of Adrian Kinder presented a serious potential conflict of interest which involved a substantial risk that Relator would not receive a fair trial if Muegler's representation continued.

(A) Standard of Review :

Respondent Judge erroneously claims her disqualification order is reviewed on a clear abuse of discretion standard. Respondent's Brief, pages, 9, 18.

Lawyer disqualification on conflict of interest grounds involves a mixed question of fact and law because such a decision results from the application of ethical standards respecting "what" constitutes a lawyer "conflict of interest" under law to the facts established by the evidence in the case. This is a traditional *de novo* appellate review situation. Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976); Cuyler v. Sullivan, 446 U.S. 335 (1980); Sumner v. Mata, 455 U.S. 591, 597 (1982).

The rejection of the deferential "abuse of discretion" standard in favor of *de novo* review is especially appropriate in this case because the presented issue involves Relator's fundamental U.S. Constitutional Sixth Amendment Right (not absolute) to legal representation by legal counsel of his choice. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502-503 (1984)(stating "when the standard governing the decision of a particular case is provided by the Constitution" close appellate scrutiny is particularly important).

Here, there is further reason for *de novo* review. The nucleus of the dispute centers on the scope of Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7 ... a decision squarely within this Court's Mo. Const. art. V, §4 supervisory power.

It should be noted that Wheat v. United States, 486 U.S. 153 (1988) does not control the standard for appellate review in this case. Wheat arose in a California federal district court ... the Supreme Court was reviewing a decision of the United States Court of Appeals For The Ninth Circuit ... and, the federal appellate review standard was well within the exclusive original jurisdiction of The United States Supreme Court to regulate and supervise the administration of justice in federal courts. Here, we have an issue involving the supervision of the administration of justice in Missouri Courts. There is no federal constitutional Separation of Powers theory which would preempt The Missouri Supreme Court from regulating inferior Missouri state courts. The Supreme Court of Missouri has the first and last word respecting the administration of justice in Missouri state courts by virtue of Mo. Const. art. V, §4, including "what" constitutes a disqualifying lawyer "conflict of interest" in Missouri courts.

The legitimacy of applying Missouri court rules in Missouri courts ... with corresponding inapplicability of federal rules in Missouri state court decisions ... is evident and firmly established. No one would seriously argue the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure or Federal Rules Of Professional Conduct supercede and replace conflicting Missouri Rules of Civil Procedure, Missouri Rules of Criminal Procedure and Missouri Rules Of Professional Conduct. Why, then, should Wheat's federal standard of deferential appellate review or federal interpretation of the federal rules relating to professional conduct apply in this case ? It should not. Missouri Law is the only relevant law.

Therefore, Relator Adrian Kinder respectfully requests *de novo* review of Respondent Judge's August 30, 2001 disqualification order (Petition Exhibit 1).

(B) Wheat Decision :

Wheat was a criminal drug conspiracy case involving several defendants. Lawyer Iredale ("Lawyer") represented two co-defendants, Gomez-Barajas and Bravo. Gomez-Barajas, the alleged drug king-pin, went to trial first on the drug charges and was acquitted. To avoid a second trial on other charges, Gomes-Barajas through Lawyer negotiated a plea and pled guilty to federal tax evasion and illegal importation of merchandise charges. At the time of commencement of Petitioner's trial Gomes-Barajas' plea had not been accepted by The Court.

Lawyer also negotiated a guilty plea for co-defendant Bravo to the lesser charge of transporting approximately 2,400 pounds of marijuana from Los Angeles to a residence controlled by Victor Vidal. The marijuana delivered to Vidal eventually was transferred to Petitioner. At the conclusion of Bravo's guilty plea, Petitioner Wheat, impressed with Lawyer's successful representation of Gomez-Barajas at trial and successful plea bargain negotiations on behalf of Bravo, retained Lawyer.

Lawyer then filed a motion to allow Lawyer's representation of Petitioner Wheat. The Government opposed the motion on "conflict of interest" grounds stating Petitioner was likely going to be a Government witness against Gomez-Barajas in the federal tax evasion and illegal importation of merchandise trial because petitioner was familiar with the sources and size of Gomez-Barajas' income ... and, thereby, the Government argued, if Lawyer be allowed to also represent Petitioner Lawyer would be prevented from effectively cross-examining Petitioner in the Gomez-Barajas trial thereby ineffectively representing Gomez-Barajas. The Government also contended the dual representation of co-defendant Bravo presented an irreconcilable conflict of interest because Bravo would be a Government witness against Petitioner to establish the chain of custody of the marijuana delivered by Bravo to Vidal and then to Petitioner ... Bravo's testimony would be in consideration of the

Government's agreement to modify its' position respecting Bravo's sentencing to a more favorable sentence from Bravo's perspective. Therefore, the Government contended, Lawyer had a direct conflict in representing Bravo and Petitioner.

Petitioner then offered to waive the 6th Amendment right to conflict-free legal counsel. The Government contended the conflict could not be waived due to the seriousness of the conflict.

The above evidence was offered and received at a hearing on Petitioner's motion for leave to have Lawyer designated as his legal counsel of record. The motion was heard two days before Petitioner's scheduled trial.

The trial court denied Petitioner's motion holding "... the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and, accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is denied". Id. at 157.

In a 5-4 decision affirming the District Court's order, Wheat held : "The district Court must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." Id. at 164 (Emphasis supplied). The Court based its' conclusions on its' further finding that the district court did not abuse its' discretion by finding serious violations of the applicable professional ethical rules of conduct of The California Bar Association (which governed Lawyer's conduct) and the American Bar Association by Lawyer's proposed dual representation of co-defendants Gomez-Barajas, Bravo and Petitioner Wheat. Id. at 160. Justices Marshall and Brennan, in dissenting opinion on other grounds, described the majority Wheat decision as recognizing the following principles :

"The right to counsel of choice, as the Court notes, is not absolute. When a defendant's selection of counsel, under the particular facts and circumstances of the case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice. Thus, a trial court may in certain situations reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process. As the Court states, however, the trial court must recognize a presumption in favor of defendant's counsel of choice. This presumption means that a trial court may not reject a defendant's chosen counsel on the ground of a potential conflict of interest absent a showing that both the likelihood and dimensions of the feared conflict are substantial. Unsupported or dubious speculation as to a conflict will not suffice. The Government must show a substantial potential for the kind of conflict that would undermine the fairness of the trial process. In these respects, I do not believe my position differs significantly, if at all, from that expressed in the opinion of the Court. See, *ante*, at 161-162, 164." *Id.* at 166.

The ultimate Wheat issue was whether the proposed representation posed a substantial risk of serious conflict of interest which would undermine the fairness of the trial process. *Id.* at 165.

(C) Respondent Judge's Reliance On Wheat Decision Misplaced :

Respondent's Brief reliance on Wheat is misplaced.

Wheat reaffirmed the proposition that a criminal defendant has a U.S.Const. Sixth Amendment right to legal counsel of his choice. *Id.* at 159. This right to choose one's counsel is not absolute, and, may be overcome by evidence showing the selected legal counsel has such a serious conflict of interest that the fairness of the trial of the case would be undermined due to the chosen

counsel's inability to conform to the ethical standards set out in the American Bar Association Code of Professional Responsibility. Id. at 162.

In any event, Wheat does not give comfort to Respondent Judge's position on two fundamental grounds.

First, the standard of review in this Court is different than the standard applied in Wheat. Wheat is the product of the deferential "abuse of discretion" standard of federal court appellate review of a federal district court decision which is not applicable in Missouri state courts. See, e.g., Wheat v. United States, 486 U.S. at 164 ("Other district courts might have reached differing or opposite conclusions [Sic: re disqualifying conflict] with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong' "); Relator's Reply Brief, Argument Reply Point I (A), *supra*.

Second, Wheat supports Relator Kinder's position in this appeal ... namely, the U.S.Const. Sixth Amendment presumption allowing Relator's selection of Muegler as his attorney of choice must stand if and until The State overcomes that presumption by substantial evidence demonstrating Muegler's continued representation of Relator would violate the Missouri Rules of Professional Conduct to such a degree that Muegler's continued representation of Relator would seriously undermine the fairness of the trial. In short, under Wheat, the presumption cannot be overcome by lawyer argument, unsupported allegations in a pleading, speculation or surmise ... substantial evidence showing either an "actual conflict of interest" or "substantial potential for a serious conflict of interest which would likely undermine the fairness of the trial against Relator" is required.

Respondent Judge received no evidence at hearing which would remotely suggest any conflict of interest resulting from Muegler's dual representation of Relator and Father much less the factual

Wheat evidence required to *prima facie* show "substantial risk" of a "serious conflict of interest" which would prove a "substantial potential to undermine the fairness of the trial process" in Relator's criminal trial.

At hearing Respondent Judge made her rulings without any evidence of conflict other than The State's conclusionary representation that Father was a State "endorsed" "key" witness in the case thereby giving rise to "a conflict of interest on the part of Mr. Muegler and which requires that the Court disqualify him as attorney of record in the case" (Petition Exhibit 3, page 6 lines 7-12).

Although Father's prior deposition was received into evidence at hearing, Respondent Judge did not read, study or know its' contents. The closest Respondent Judge came to commenting on "evidence" in the case is when she said at the conclusion of the hearing and immediately prior to her disqualification ruling : "The defendant's father, Mr. Kinder, is going to be a witness in this case. And I have been looking through the deposition, his deposition. And I would like to put on the record I don't really know the facts of this case, so I don't know the facts of this case except that the victim was the defendant's mother and obviously Mr. Kinder's wife was the victim in this case." Petition Exhibit 3, page 37 lines 15-22.

Previously, the following exchange took place between Respondent Judge and The State, to wit :

"Mr. Calhoun : ... Mr. Kinder is an essential and key witness by the State, the testimony he is going to give is essential and adverse to the defendant and that he has admitted under oath that Mr. Muegler represents both he and the defendant, the State is asking that he be --- that Mr. Muegler be disqualified as acting for both parties.

The Court : And are you telling the Court that you definitely will be calling --

Mr. Calhoun : Yes.

The Court : When you say he is an essential witness, without going into --- I'm not asking what his testimony is going to be, specifics, but is he --- when you say he is a key witness, he is a witness that you need to make your case; is that what you are saying ?

Mr. Calhoun : Correct."

Petition Exhibit 3, page 10, lines 8-24.

Clearly, Respondent Judge intentionally refused to inquire into or consider the "specifics" (i.e. the "facts" as opposed to The State's "conclusions") of "what adverse testimony" Father would be expected to give at Relator's trial on The State's behalf. The State thereby failed to meet its Wheat burden of proof to present sufficient, substantial factual evidence to rebut the legal presumption favoring Relator's U.S. Const. Sixth Amendment Right to Muegler as his legal counsel of choice. Respondent Judge had no evidence touching or concerning the likelihood and dimensions of the feared Muegler conflict of interest to support any Wheat factual finding of "actual conflict of interest" or "substantial potential for a serious conflict of interest which would undermine the fairness of the trial process". There simply was no evidence to support these required Wheat conclusions.

And, independently, Respondent Judge did not make the required findings to justify reliance on Wheat in that Respondent Judge made no finding that Muegler's dual representation of Relator and Father at deposition presented a "substantial risk of a serious conflict of interest which would undermine the fairness" of the trial against Relator if Muegler not be disqualified as Relator's legal counsel.

Instead, Respondent Judge ruled: "I'm concerned that there is an appearance of a conflict of interest here" (Petition Exhibit 3, page 38 lines 12-13)(Emphasis supplied) and "I think there is a

potential conflict of interest, and I do think that maybe this conflict of interest could also arise during the middle of trial" (Petition Exhibit 3, page 38 lines 21-23)(Emphasis supplied).

Therefore, even under the inapplicable federal "abuse of discretion" deferential appellate review standard Respondent Judge committed prejudicial err by entering the disqualification order because (1) she erred as a matter of law by not making the required Wheat factual and legal conclusion findings and (2) there was no substantial or competent evidence to *prima facie* show Muegler's continued representation of Relator presented a "substantial potential for a serious conflict of interest which would likely undermine the fairness" of the trial against Relator.

(D) After-Thought "Facts" :

As an after-thought epiphany to try and breath life into the flawed disqualification (i.e. ruling not supported by the evidence or the law), The State and Respondent Judge proffered alleged conflict of interest "facts" for the first time in the Eastern District Court of Appeals writ application proceeding ... and, now, again in this Court ... to somehow retroactively try to justify the disqualification order. These post-hearing generated "facts" are set out at Relator's Brief (2/11/2002), pages 22-25; Respondent's Brief (3/1/2002), pages 13-14.

Now, The State comes up with additional, first-time-raised "facts" in Respondent's Brief which they say shows an actual conflict of interest. These newly thought-up "facts" are truly off-the-wall assertions having no merit whatsoever, to wit :

- Respondent's Brief page 4 ¶2 through page 15 ¶1 says: "When Kevin Kinder is called as a witness at trial he will be testifying to facts that he testified to at deposition while he was represented by Mr. Muegler. This means that while preparing Relator's case for trial, Mr. Muegler advised Kevin Kinder with regard to his testimony as a state's witness in the

case. This creates a conflict of interest." What ??? One must ask ... "what Kevin Kinder deposition testimony is contested and adverse to Relator Kinder's interest ?" ... "Where's the conflict, if any, between Kevin Kinder's testimony and the interest of Relator Adrian Kinder ?" ... etc. What if, as Relator contends, Kevin Kinder's deposition testimony and trial testimony is truthful and not antagonistic to any fact favorable to Relator's defense theory ? Respondent's Brief conclusion that Kevin Kinder will testify in a fashion to create a serious conflict of interest for Muegler is contrary to the facts and logic of the situation. It's speculative beyond comprehension at a minimum ... some might say absurd !

- Respondent's Brief page 15 ¶1 then says "Kevin Kinder is the victim's spouse who identified the murder weapon as belonging to him. Mr. Kinder has no alibi for his whereabouts at the time of the murder. As a part of his defense at trial, it would be in Relator's best interest to have counsel attempt to attribute the murder of the victim to Kevin Kinder. However, this conflicts with the interest of the witness represented by attorney Muegler and again presents Muegler with a conflict in advising his clients in regards to their trial testimony." It must have been late at night when this outrageous language crept into Respondent's Brief ! First, Respondents' Brief falsely assumes Muegler (1) did not anticipate the no-alibi situation in this case when Muegler self-assessed a potential Rules of Professional Conduct, Rule 1.7 conflict of interest before agreeing to the Kevin Kinder deposition representation and (2) did not conduct a pre-engagement investigation which resulted in the conclusion that Kevin Kinder had no involvement whatsoever in the death of his wife. Worse yet, Respondent's Brief seems to

suggest Muegler, to avoid a disqualifying "conflict of interest", should falsely argue at Relator's trial [in order to misdirect the court and jury] that Kevin Kinder is the murderer as a defense to get Relator off the hook ... even if there is no evidence to support that contention and even if Relator and Muegler believe the contention to be totally false. In sum, Respondent's Brief outrageously encourages breach of Muegler's candor professional ethical obligations under Rules of Professional Conduct, Rule 3.3(a)(4), Rule 3.4(b) and Rule 3.4(e). See, e.g., In Re Stormont, 873 S.W.2d 227 (Mo. banc 1994). This argument by Respondent Judge shows just how far afield The State is willing to go in this case to avoid having Muegler as an opponent at Relator's trial.

But, The State is not through guilting-the-lilly with falsehoods. At Respondent's Brief page 16 ¶2 it is represented "The trial court [Sic: Respondent Judge] read through the deposition of the witness [citation omitted] and concluded that a potential conflict of interest existed and was of such a serious nature that it could arise at trial". First of all, Respondent Judge didn't read anything ... the deposition was first placed in the court file during the course of the hearing [Petition Exhibit 3, page 5 lines 16-20] ... she admitted she didn't read anything in the deposition but she noticed some objections as she was thumbing through it [Petition Exhibit 3, page 37 lines 15-22]. Second, Respondent Judge never described the "potential conflict" as "serious", "substantial" or even "likely to arise at trial". See, entire hearing transcript at Petition Exhibit 3.

The State, through Respondent's Brief misrepresentations and the "newly discovered" revelations of "conflict" urged for the first time in the Court of Appeals and now in this Court, evidence the prosecutorial mischief mentioned at Relator's Brief pages 27-29 to manufacture some reason, no matter how absurd or unrelated to truth, to pretextually justify disqualification of a criminal defendant's

trial counsel of choice to tilt the playing field, and thereby increase the conviction percentage, of The State prosecutor.

(E) Missouri Code Of Professional Conduct Not Violated :

Wheat teaches that a serious actual or threatened violation of a state's code of ethical conduct is required before a lawyer of choice can be involuntarily disqualified from representation of a criminal defendant. Wheat v. United States, 486 U.S. at 162.

It was Muegler's responsibility, as a Missouri licensed lawyer, in the first instance to self-assess and determine, based upon all the facts known to him, whether he had a conflict of interest as a result of the dual representation of Relator and Father under Missouri Supreme Court Rule 4, Rules of Professional Conduct, Rule 1.7 ("Rule 1.7"). Obviously, Muegler made that self-assessment and determined "no conflict of interest" existed for the reasons set out at Relator's Brief (2/11/2002), pages 25-27.

Now, in substance, The State through Respondent Judge wants to render this traditional "self-assessment and determination" professional responsibility impotent by giving it no weight in a disqualification proceeding founded on conflict of interest. Here, Respondent Judge not only failed to recognize Relator's Sixth Amendment presumption favoring retention of Muegler as Relator's legal counsel, but she also completely ignored Muegler's self-assessment that no conflict of interest existed.

Instead, Respondent Judge blindly accepted The State's conclusions that Father was an endorsed "key" witness who would testify "adversely" to Relator at trial. See, Petition Exhibit 3 page 10, lines 8-24. She specifically asked not to be informed of the "facts" The State claimed to support the ultimate "key witness" and "adverse testimony" conclusions. Id.

The State offered no evidence at hearing which could be construed to support a "conflict of interest" under Rule 1.7.

Instead, Respondent Judge, with no evidentiary support, impermissibly adopted an imputed conflict of interest disqualification merely because The State endorsed Father as a possible trial witness. Respondent Judge did not require The State to produce evidence showing either an "actual conflict of interest" or a "substantial risk of a serious conflict of interest which would undermine the fairness of the trial". In substance, Respondent Judge abdicated her function as judge by blindly accepting The State's conclusionary "conflict of interest" remarks as gospel without any evidentiary proof suggesting a Rule 1.7 ethical violation. In fact, there was no Rule 1.7 violation.

Therefore, the predicate (i.e. State ethics code violation) for Wheat disqualification is absent in this case.

(F) Conclusions :

Respondent's Brief erroneously claims this case is reviewed on an "abuse of discretion" standard. *De novo* appellate review is the proper standard in this case because the issues in this proceeding involve (a) matters within this Court's exclusive power to supervise judicial proceedings in inferior Missouri courts, (b) matters of law within the scope of Murphy v. Carron and (c) Sixth Amendment constitutional issues.

Respondent's Brief provides no valid argument or theory to legally justify Respondent Judge's disqualification order. Wheat acknowledges the presumption favoring Relator's U.S. Const. Sixth Amendment right to legal counsel of his choice. Wheat further acknowledges this presumption may only be overcome by evidence showing Muegler had a serious "actual conflict of interest" or Muegler's continued representation of Relator presented a "substantial potential for a serious conflict of interest

which would likely undermine the fairness" of the trial against Relator. The State failed to meet its' burden of proof on these issues. There was no evidence on these issues whatsoever at hearing.

Instead, Respondent Judge clearly committed prejudicial err by impermissibly imputing a "conflict of interest" disqualification merely because (1) Father was a State's endorsed witness and (2) The State Prosecutor concluded, without revealing any factual details, Father was a "key witness" who would testify "adversely" to Relator at trial thereby creating a non-waivable Muegler conflict of interest. See, Relator's Brief (2/11/2002), Argument Point I.

The Court's December 18, 2001 writ of prohibition should now be made absolute.

Reply Point II.

In the alternative to relief under Relator's Brief Point I, if The Court finds Muegler had a disqualifying conflict of interest, Relator Adrian Kinder ("Adrian") is entitled to (1) an absolute order prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying attorney Muegler from legal representation of Adrian Kinder in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 ("Criminal Case") and (2) a supplementary order directing the trial court to conduct a hearing to determine whether Adrian knowingly and voluntarily waives the "ineffective assistance of counsel" issues presented in this case because (1) no disqualifying constitutionally or ethics based conflict of interest is implicated if Adrian knowingly and voluntarily waives an attorney conflict of interest and (2) at the prior hearing Adrian did not believe Muegler had a conflict of interest, and, therefore, it was not

possible for Adrian at that time to "knowingly and voluntarily waive" any conflict of interest.

(A) Standard of Review :

Respondent Judge erroneously claims this point is reviewed on a clear abuse of discretion standard. Respondent's Brief, page 19 ¶2 . The appropriate standard is *de novo* review. Each point, authority and argument made at Relator's Reply Brief, Argument, Reply Point I(A), supra, is realleged and is incorporated by reference here.

(B) Relator Entitled To Waiver Hearing And Determination :

At Relator's Brief (2/11/200), pages 30-32, it was shown that Adrian is entitled to a hearing on the conflict of interest issue should this Court find a disqualifying conflict of interest. Adrian also suggested The Court adopt a Henderson v. Smith, 903 F.2d 534 (8th Cir. 1990) type hearing procedural requirement for inferior Missouri courts to follow in attorney conflict of interest situations. Id. at 32.

Now, if this Court finds that Muegler did have an actual conflict of interest in this case, then Adrian will have to accept the ruling.

At this point, neither Adrian, Father of Muegler believe there is either a conflict of interest or a serious risk of conflict that presents a substantial risk that Adrian would not get a fair trial if Muegler continues representing Adrian. See, Petition Exhibit 3, page 13 lines 13-18 and page 29 line 17.

It, therefore, was impossible for Adrian to "knowingly" and "voluntary waive" the factually unspecified "conflict of interest" issue presented in this proceeding because Adrian did not believe a "conflict of interest" existed at the time of the August 30, 2001 hearing before Respondent Judge. Respondent's Brief page 20 statement "Relator is not entitled to a second hearing because the court

has already refused his waiver of the conflict" is non-sense. Adrian never had a hearing on the waiver issue.

Present Missouri Law holds "There is ... no deprivation of constitutional right if the defendant knowingly consents to being represented by an attorney who also represents a prosecution witness." Ciarelli v. State, 441 S.W.2d 695, 697 (Mo. 1969); State ex rel Flee v. Conley, 809 S.W.2d 405 (Mo. App. 1991).

As pointed out at Relator's Brief page 32, this Court has not mandated that a trial court *sua sponte* conduct a Henderson type "waiver" hearing on conflict issues. But, we believe it is a good idea to do so especially to protect against premature attorney disqualifications in cases like the case *sub judice* where the client and attorney do not believe a conflict of interest exists.

(C) Conclusions :

Adrian has not had a hearing on the waiver of conflict issue. If this Court finds Muegler had a conflict of interest, then Adrian respectfully requests The Court to make the writ of prohibition absolute with a supplementary order directing the trial court to make a Henderson v. Smith type inquiry in open court to allow waiver evidence to be presented. This, Adrian contends, would be a proper balancing of Adrian's interest, Sixth Amendment "ineffective assistance of counsel" law and the ethical considerations under Missouri Supreme Court Rule 4, Rules of Professional Conduct Rule 1.7.

VI.

Conclusions

Based upon the facts, points, authorities and argument contained in this Relator's Reply Brief Point I and Relator's Brief (2/11/2002) Point I, the December 18, 2001 preliminary writ of prohibition

should now be made absolute preventing and prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying Muegler from serving as Adrian's legal counsel in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786.

In the alternative to relief under Relator's Brief (2/11/2002) Point I, based upon the facts, points, authorities and argument contained in this Relator's Reply Brief Points I & II and Relator's Brief (2/11/2002) Points I & II, if The Court finds a conflict of interest did exist which was not effectively waived by Adrian Kinder, then the December 18, 2001 preliminary writ of prohibition should now be made absolute preventing and prohibiting Respondent Judge from enforcing the August 30, 2001 order disqualifying Muegler from serving as Adrian's legal counsel in State v. Adrian Kinder, Circuit Court of The County of St. Louis, Missouri, Cause No. 00CR-4786 and further ordering the trial court to conduct a hearing on the record inquiring into whether Adrian Kinder knowingly and voluntarily waived his Sixth Amendment right to assistance of legal counsel unencumbered by a conflict of interest.

Arthur G. Muegler, Jr. MoBar #17940

Rule 84.06(c) Certification

Pursuant to Rule 84.06(c) the undersigned hereby certifies this Relator's Reply Brief (a) contains the information required by Rule 55.03, (b) complies with the limitations contained in Rule 84.06[b], (c) contains 5,858 words [without excluding words permitted to be excluded] determined by The Microsoft Office 2000 Word computer program count [program used to prepare this Relator's Reply Brief] and (d) pursuant to Rule 84.06[g] the disks containing this Relator's Reply

Brief that are filed with The Court and served on the parties have been scanned for viruses and are virus free.

Dated this 8th day of March, 2002.

Arthur G. Muegler, Jr. MoBar #17940
Attorney for Relator Adrian Kinder

Certificate of Service

The undersigned certifies two (2) true copies of Relator's Reply Brief herein [together with one (1) 3 ½" computer diskette, scanned for virus, containing the same which is virus free] and this Certificate of Service were served March 8, 2002 by First Class U.S. Mail, postage prepaid, addressed to Respondent Judge's legal counsel, S. Bart Calhoun, Assistant St. Louis County Prosecutor, 100 South Central, Clayton, Missouri 63105 and (314)615-2610.

Arthur G. Muegler, Jr. MBE #17940
P.O. Box 230143
St. Louis, Missouri 63123
(314)324-7739 And FAX (314)367-7063
Attorney for Relator Adrian Kinder